

Office of Chief Counsel
Internal Revenue Service
Memorandum

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subject: ET 6020(b) Returns by Revenue Officer Worker, PREF-151037-07

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

Whether revenue officers have authority under IRC §6020(b) to prepare employment tax returns in employment tax cases in which worker classification issues are present.

CONCLUSION

In employment tax cases where worker classification issues are present, revenue officers have authority under IRC §6020(b) to prepare employment tax returns, but the requirements of IRC §7436 must be met prior to assessment.

FACTS

We have been asked to review a memorandum which addresses the issue of whether a revenue officer has authority under IRC §6020(b) to prepare employment tax returns on behalf of taxpayers who fail to file such returns in a case in which worker classification

issues are present and where the revenue officer did not refer the case to the Employment Tax Program as required under the Internal Revenue Manual (IRM).

The facts indicate that, for the years at issue, the taxpayer took the position that certain workers were independent contractors for federal tax purposes. However, for previous years the taxpayer had treated such workers as employees. After reviewing the facts of the case, the revenue officer determined that the workers should have been treated as employees for federal tax purposes and prepared Substitute for Returns (SFRs) under IRC §6020(b). The taxpayer objected to the preparation of the SFRs and requested an appeal. The appeals officer concluded that the worker classification issue was undeveloped and that “the revenue officer did not have the authority to prepare Forms 941 under IRC §6020(b) procedures because the IRM requires the issue to be referred to the Employment Tax Program,” and recommended the government concede the case.

LAW AND ANALYSIS

Where there is an actual controversy involving a determination by the Secretary that one or more individuals performing services for the taxpayer are employees as part of an examination, IRC §7436 gives the Tax Court jurisdiction to determine certain “worker classification issues” (i.e., the proper amount of the additions to tax, additional amounts, and penalties that relate to the employment tax imposed by subtitle C with respect to determinations of worker classification and whether the taxpayer is entitled to relief under §530 of the Revenue Act of 1978). To meet the requirements of IRC §7436, certain procedures must be followed prior to an assessment of employment taxes.

Notice 2002-5, 2002-1 C.B. 320, describes the procedures that IRC §7436 requires. Notice 2002-5 provides generally that a taxpayer will first receive a “30-day” letter which lists the proposed employment tax adjustments to be made and describes the taxpayer’s right either to agree to the proposed adjustments or to protest the proposed adjustments to the Appeals function of the Service (Appeals) within 30 days of the date of the letter. If the taxpayer does not respond to the “30-day” letter by agreeing to the proposed adjustments or by filing a protest to Appeals, the taxpayer will receive a Notice of Determination of Worker Classification (NDWC).¹ The taxpayer may also receive the NDWC if the taxpayer files a protest with Appeals and the worker classification issues are not settled in Appeals.

Notice 2002-5 further provides that under IRC §7436(d)(1), the mailing of the NDWC suspends the period of limitations for assessment of taxes attributable to the worker classification issues for the 90-day period during which the taxpayer can bring suit² and precludes the Service from assessing the taxes identified in the NDWC prior to the expiration of the 90-day period during which the taxpayer may file a timely Tax Court

¹ The NDWC is a jurisdictional prerequisite for seeking Tax Court review under IRC §7436.

² If the taxpayer does file a timely petition in Tax Court, the period of limitations for assessment is suspended until 60 days after the decision of the Tax Court becomes final.

petition. If the Service erroneously makes an assessment of taxes attributable to the worker classification issues without first either issuing a NDWC or obtaining a waiver of restrictions on assessment from the taxpayer, the taxpayer is entitled to an automatic abatement of the assessment. However, once any such procedural defects are corrected, the Service may reassess the employment taxes to the same extent as if the abated assessment had not occurred.

A taxpayer may settle the worker classification issues either before issuance of the NDWC or after issuance of the NDWC but before expiration of the 90-day period for filing a Tax Court petition. To settle the worker classification issues, the taxpayer must formally waive the restrictions on assessment contained in IRC §§7436(d) and 6213(a). If the taxpayer does not settle or file a Tax Court petition before the ninety-first day after the NDWC is mailed, the employment taxes identified in the NDWC shall thereafter be assessed.

Under IRC §6501(a), the amount of any tax imposed by the Code shall be assessed within 3 years after the return was filed, subject to certain specified exceptions. Under IRC §6020(b), if any person fails to make a required return or makes, willfully or otherwise, a false or fraudulent return, the Secretary is authorized to make a return from his or her own knowledge and from such information as can be obtained through testimony or otherwise. Section 6020(b)(2) provides that any return made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.³

In this case, the taxpayer failed to file an employment tax return and did not submit evidence to establish that no employment tax return was due. The revenue officer determined that some of the taxpayer's workers were employees and that an employment tax return should have been filed. The revenue officer prepared returns pursuant to the authority in IRC §6020(b).⁴

Because the revenue officer failed to meet the requirements of IRC §7436, an assessment of employment taxes based on the IRC §6020(b) return prepared by the revenue officer in this case is improper. However, the facts in this case do not indicate that the government is required to concede the case. Notice 2002-5 provides that once the procedural defects are corrected and the requirements of IRC §7436 are met, employment taxes may thereafter be assessed.

In employment tax cases where worker classification issues are present, revenue officers have authority under IRC §6020(b) to prepare employment tax returns, but the requirements of IRC §7436 must be met prior to assessment.

³ Note, however, that IRC §6501(b)(3) provides that notwithstanding IRC §6020(b), the execution of a return by the Secretary pursuant to such section shall not start the running of the period of limitations on assessment and collection.

⁴ Delegation Order Number 182 specifically gives Revenue Officers the authority to prepare returns pursuant to IRC §6020(b). In addition, Revenue Procedure 77-13, 1977-1 C.B. 570, specifically discusses the preparation of IRC §6020(b) returns by Revenue Officers.

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